

(4)

No. 96-6839

Supreme Court, U. S.

FILED

MAY 27 1997

CLERK

In The
Supreme Court of the United States
October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

PETER FLEURY*
TIMOTHY CROOKS
Assistant Federal
Public Defenders
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
Counsel for Petitioner

WALTER DELLINGER*
Acting Solicitor General
Department of Justice
Washington, DC 20530-0001
(202) 514-2217
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed November 20, 1996
Certiorari Granted March 31, 1997

24 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries of the District Court	1
Indictment	3
Factual Resume	5
Excerpts from Guilty Plea Hearing Transcript	8
Excerpts from Sentencing Hearing Transcript.....	15
Opinion of the Fifth Circuit Court of Appeals.....	18
Judgment of the Fifth Circuit Court of Appeals	20
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 31, 1997	22

RELEVANT DOCKET ENTRIES

- 9/12/95 INDICTMENT as to Hugo Roman Almendarez-Torres
- 10/27/95 Minute entry as to Hugo Roman Almendarez-Torres: ARRAIGNMENT; Held before Judge John McBryde Court Reporter: Eileen Brewer; AUSA Gartner and Fleury present; Defense waived reading of Indictment; Dft enters plea of not guilty; Trial set for 12.18.95 at 8:30am; Pretrial motions due 11.13.95; Discovery motions/Govt responses due 11.20.95; Dft remanded to custody.
- 12/1/95 Minute entry as to Hugo Roman Almendarez-Torres: REARRAIGNMENT; Held before Judge John McBryde Court Reporter: Eileen Brewer; AUSA Bradford and FPD Fleury present; Held on count 1; deft enters plea of GUILTY; factual resume filed; sentencing set 3-1-96 at 9am; psi due 1-8-96; deft remanded to custody.
- 3/1/96 Minute entry as to Hugo Roman Almendarez-Torres: SENTENCING; Held before Judge John McBryde Court Reporter: Susan Griggs-Merit Court Reporters; AUSA Bradford and FPD Fleury present; deft committed to BOP 85 months; placed on supervised release 2 yrs; MSA \$50 on ct 1; deft advised of his right to appeal; deft remanded to custody.
- 3/4/96 NOTICE OF APPEAL by Hugo Roman Almendarez-Torres (1) count 1 - from judgment of conviction and sentence; no fee paid; FPD atty; copies dist to judge, usaty, atty, prob/prtrial, usm

- 3/6/96 JUDGMENT Hugo Roman Almendarez-Torres (1) count(s) 1. Pled guilty-Committed to BOP 85 months; MSA \$50.00; No fine imposed; Supervised Release 2yrs; Dft remanded to custody of USM. (Signed by Judge John McBryde)
- 9/20/96 JUDGMENT OF USCA (certified copy) as to Hugo Roman Almendarez-Torres Re: [18-1] appeal affirming judgment/order Hugo Roman Almendarez-Torres (1) count(s) 1 (1) ctj. . . . judgment of the district court is affirmed
- 9/20/96 OPINION OF USCA (certified copy) in accordance with USCA judgment re: [26-1] appeal . . . judgment of the district court is affirmed (2)
-

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES

v.

HUGO ROMAN
ALMENDAREZ-TORRES

Crim. No.
4:95-CR-124A

(Filed September 12, 1995)

The Grand Jury charges;

That on or about July 28, 1995, in the Fort Worth Division of the Northern District of Texas, HUGO ROMAN ALMENDAREZ-TORRES, defendant, an alien, who had been previously arrested and deported from the United States on or about April 18, 1992, knowingly and unlawfully was found in the United States, that is, he did not, prior to his re-entry into the United States after being deported, obtain permission and consent of the Attorney General to re-enter the United States.

A violation of Title 8, United States Code, Section 1326.

A TRUE BILL.

/s/ Charles Gillaspie
FOREMAN

PAUL E. COGGINS
UNITED STATES ATTORNEY

/s/ John P. Bradford
JOHN P. BRADFORD

Assistant United States Attorney
State Bar No. 02818300
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: 817-334-3291

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(TITLE OMITTED IN PRINTING)

FACTUAL RESUME

INDICTMENT: *One Count - Illegal Re-Entry After Deportation, in violation of Title 8, United States Code, Section 1326.*

PENALTY: \$250,000 fine - 10 years imprisonment, or both, plus a term of supervised release of up to 3 years.

MAXIMUM PENALTY:

\$250,000 fine and 10 years imprisonment, plus a term of supervised release of 3 years. Further, if the terms of supervised release are violated, the defendant can be imprisoned for the term of supervised release. In addition, the Court must impose a MANDATORY SPECIAL ASSESSMENT: \$50.00.

ELEMENTS
OF THE
OFFENSE:

To establish the guilt of the defendant for the offense alleged in the Indictment, the government must prove the following elements beyond a reasonable doubt:

1. That on or about the date alleged in the Indictment the defendant was an

alien unlawfully found in the United States;

1. That the defendant has been previously arrested and deported from the United States; and

3. That prior to defendant's re-entry into the United States he did not obtain permission and consent from the Attorney General to re-enter the United States.

FACTS:

HUGO ROMAN ALMENDAREZ-TORRES is a national of Mexico, having been born in Villa Hidalgo, San Luis Potosi, Mexico on August 9, 1971.

On March 11, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offense of Burglary of a Habitation in Cause Number 0432394D. On July 26, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offenses of Burglary of a Habitation in Cause Numbers 0444757A and 0437963A. On March 14, 1991 the defendant was convicted in a Criminal District Court of Dallas County, Texas for the offense of Burglary of a Habitation in Case Number F-91-29541-UH.

The defendant, on April 18, 1992 was deported from the United States to Mexico at Brownsville, Texas pursuant to his convictions.

In June 1992 the defendant illegally entered the United States by crossing

the Rio Grande River near Laredo, Texas and evading inspection by a United States Immigration Officer. On July 28, 1995 the defendant, HUGO ROMAN ALMENDAREZ-TORRES was found by an agent of the United States Border Patrol to be incarcerated in the Tarrant County jail. Investigation revealed that in June 1992 the defendant had illegally entered the United States by crossing the Rio Grande River near Laredo, Texas and evading inspection by a United States Immigration Officer.

Investigation further revealed that there was no record on file with the INS Central Office, Records Management Branch, Operations Section, Certification Unit, in Washington, D.C. that the defendant had applied for or received permission to re-enter the United States after deportation.

SIGNED AND AGREED TO THIS 29th day of November, 1995.

/s/ Hugo R. Almendarez	/s/ John P. Bradford
HUGO ROMAN	JOHN P. BRADFORD
ALMENDAREZ-TORRES	Assistant United
Defendant	States Attorney

/s/ Peter Fleury
PETER FLEURY
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(TITLE OMITTED IN PRINTING)

(EXCERPTS FROM GUILTY PLEA
HEARING TRANSCRIPT)

(pp. 6, 10-17)

* * *

[6] The Court is not bound by facts that are stipulated between you, on the one hand, and the government, on the other. The Court can impose punishment that might disregard stipulated facts or take into account facts not mentioned in the stipulated facts. You might not be permitted to withdraw your plea of guilty in such an event.

* * *

[10] THE COURT: Now I think we may have reviewed this before. You have received a copy of the indictment in this case?

THE DEFENDANT: Yes, sir.

THE COURT: And you've read it and understood it?

[11] THE DEFENDANT: Yes, sir.

THE COURT: And discussed it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: You know exactly what you're being charged with?

THE DEFENDANT: Yes, sir.

THE COURT: Illegal reentry after deportation?

THE DEFENDANT: Yes, sir.

THE COURT: In violation of Title 8, United States Code, Section 1326?

THE DEFENDANT: Yes, sir.

THE COURT: Unless there's a waiver of the reading of the indictment, I'm going to ask that it be read at this time.

MR. FLEURY: We will waive the reading of the indictment, Your Honor.

THE COURT: Okay. Now I have with me a document that has been handed up this morning called factual resume. I'm going to hold it up so you can see what I'm talking about. Do you see that?

THE DEFENDANT: Yes, sir.

THE COURT: It appears to bear your signature. Did you sign that?

THE DEFENDANT: Yes, sir.

THE COURT: It looks like you may have signed it the day before yesterday?

[12] THE DEFENDANT: Wednesday, yes, sir.

THE COURT: And did you read it before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you discuss it with Mr. Fleury before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Well, you understand the next thing I'm going to go over with you because it's in this document. But it's important so I'm going to review it with you again.

If you were to persist in a plea of not guilty to the one-count indictment, for you to be convicted of the offense charged by that count, the government would have to prove to a jury beyond a reasonable doubt each of the following elements:

First, that on or about the date alleged in the indictment you were an alien unlawfully found in the United States.

Second, that you had previously been arrested and deported from the United States.

And, third, that prior to your reentry into the United States you did not obtain permission and consent from the Attorney General to reenter the United States.

Now do you understand that?

THE DEFENDANT: Yes, sir.

[13] THE COURT: And do you understand that if each and every one of those elements could not be proved to a jury beyond a reasonable doubt, that you

would be acquitted and found not guilty of the offense charged by the indictment if you were to persist in your plea of not guilty. Do you understand that?

THE DEFENDANT: Yes, I understand that.

THE COURT: Do you admit that each and every one of those elements exist in this case?

THE DEFENDANT: Yes, sir.

* * *

[14] THE COURT: No one said you're going to get any benefit by pleading guilty or get any special deal by pleading guilty?

THE DEFENDANT: No, sir.

THE COURT: No one has made any kind of a promise or assurance to you of any kind; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone mentally, physically, or in any other way attempted to force you to plead guilty in this case?

THE DEFENDANT: No, sir.

THE COURT: Do you understand that if you plead guilty and if your guilty plea is accepted, you will be adjudged guilty of the offense charged by the one-count indictment in this case, and that your punishment will be assessed somewhere within the range of punishment provided by statute and your sentence will be within the range provided by statute.

THE DEFENDANT: Yes, sir.

THE COURT: Now the penalty you're subjecting yourself to by a plea of guilty is set forth in this factual resume that you signed so you fully understand that. But I'm going to go over that again. It's important.

If you plead guilty you're subjecting yourself to the [15] following penalties and punishments: A fine of \$250,000; plus, a term of imprisonment of ten years; plus, a term of supervised release of three years. Now that supervised release will be subject to conditions that I'll set at the time of sentencing. If you were to violate any of those conditions, your supervised release could be revoked and you could be required to serve further imprisonment, and that additional imprisonment could be up to the full term of the supervised release.

In addition, you could be required - or you would be required to pay a special assessment of \$50 at the time of sentencing. Do you understand that you're subjecting yourself to all those penalties and punishments by a plea of guilty to the count in the one-count indictment?

THE DEFENDANT: Yes, sir.

* * *

[16] THE COURT: Okay. I'll accept the plea of guilty on condition that there's a factual basis to support it, and I'll ask that the facts section of the factual resume be read into the record.

MR. BRADFORD: If it please the Court. Hugo Roman Almendarez-Torres is a national of Mexico having been born in Villa Hidalgo, San Luis Potosi, Mexico on August 9, 1971.

On March 11, 1991, the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas, for the offense of burglary of a habitation in Cause No. 0432394D. On July 26th, 1991, the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas, for the [17] offenses of burglary of a habitation in Cause Nos. 0444757A and 0437963A. On March 14, 1991, the defendant was convicted in Criminal District Court of Dallas County, Texas, for the offense of burglary of a habitation in Cause No. F-91-29541-UH.

The defendant on April 18, 1992, was deported from the United States to Mexico at Brownsville, Texas, pursuant to his convictions.

In June 1992 the defendant illegally entered the United States by crossing the Rio Grande River near Laredo, Texas, and evading inspection by a United States Immigration Officer. On July 28, 1995, the defendant, Hugo Roman Almendarez-Torres, was found by an agent of the United States Border Patrol to be incarcerated in the Tarrant County jail. Investigation revealed that in June 1992 the defendant illegally entered the United States by crossing the Rio Grande River near Laredo, Texas, and evading inspection by a United States Immigration Officer.

Investigation further revealed that there was no record on file with the INS Central Office, Records Management Branch, Operations Section, Certification Unit, in Washington, D.C. that the defendant applied for or received permission to reenter the United States after deportation.

THE COURT: Okay. You've heard the facts section of the factual resume read. Are all those facts true and correct?

THE DEFENDANT: Yes, sir.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(TITLE OMITTED IN PRINTING)

(EXCERPTS FROM SENTENCING
HEARING TRANSCRIPT)

(pp. 1-4, 7)

* * *

[2] THE COURT: Okay. The next matter is United States of America versus Hugo Roman Almendarez-Torrez.

Mr. Bradford is here for United States of America; Mr. Fleury is here for the defendant. Does this defendant need an interpreter, Mr. Fleury?

MR. FLEURY: No, Your Honor.

THE COURT: Do you commonly go by the surname "Almendarez"?

MR. ALMENDAREZ: Yes, sir.

THE COURT: Okay. You appeared before me on December 1, 1995, at which time you entered a plea of guilty to the charge of illegal re-entry after deportation. That charge was made against you on a one-count indictment.

There was no plea agreement pursuant to which you entered the plea, and we're here today for sentencing of you based on your conviction pursuant to that plea of guilty.

Mr. Fleury, did you and your client receive in a timely manner the presentence investigation report and the addendum to it?

MR. FLEURY: We did, Your Honor.

THE COURT: Did both of you read it and [3] discuss it with each other?

MR. FLEURY: Yes, Your Honor.

THE COURT: Okay. The only objection made by the defendant - let's see the government made an objection.

Let's see, the government objected to Paragraph 52 of the report and the probation officer accepted that objection.

I take it you're satisfied with that, Mr. Bradford?

MR. BRADFORD: Yes, Your Honor. A clarification on the government's part, an agreement causing an increase in the statutory sentence and the government failed to catch it and the probation department made a change.

THE COURT: Okay. And then the defendant's objection is to Paragraphs 52 and 53 raising an issue that has been resolved against the defendant by the Fifth Circuit but apparently has gone in favor of defendants by other circuits. Is that basically true?

MR. FLEURY: That's correct, Your Honor.

THE COURT: And you are just making it for the record. I assume you don't expect me to -

MR. FLEURY: I understand.

[4] THE COURT: - not follow the Fifth Circuit law?

MR. FLEURY: I understand.

THE COURT: Okay. And so I'll overrule that objection. Is that your only objection?

MR. FLEURY: That is, Your Honor.

THE COURT: Okay. I'll overrule that objection.

There being no further objections to the presentence investigation report, the Court adopts as the fact finding report, the facts set forth in the presentence investigation report and adopts as modified or supplemented by the addendum and adopts the conclusions of the Court, the conclusions set forth in the presentence investigation report as modified and supplemented by the addendum.

The Court concludes that the total offense level is 21, that the criminal history category is six, that the imprisonment range is 77 months to 96 months, but with a supervised release of two to three years, that the fine range is \$7,500 to \$75,000 and that a special assessment of \$50 is mandatory.

* * *

[7] The Court orders and adjudges that the defendant be committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 85 months. The Court further orders and adjudges that the defendant, upon discharge from prison, be placed on supervised release and serve a term of supervised release of two years.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10254
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO ROMAN ALMENDAREZ-TORRES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:95-CR-124-A

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 22, 1996]

Before KING, DUHÉ, and DeMOSS, Circuit Judges.

PER CURIAM:*

Hugo Roman Almendarez-Torres appeals his judgment of conviction and sentence after pleading guilty to reentry after deportation in violation of 8 U.S.C. § 1326. He argues that he was charged with and pleaded guilty to § 1326(a), simple reentry, but that he was sentenced as if

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

he had pleaded guilty to reentry following a conviction for an aggravated felony for purposes of § 1326(b)(2). His argument is foreclosed by this court's opinion in *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994).

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10254
Conference Calendar

D.C. Docket No. 4:95-CR-124-A

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HUGHO [sic] ROMAN ALMENDAREZ-TORRES

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Fort Worth

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 22, 1996]

[FILED IN THE U.S. DISTRICT COURT, NORTHERN
DISTRICT OF TEXAS-SEPTEMBER 20, 1996]

(JURAT OMITTED IN PRINTING)

Before KING, DUHE', and DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on
appeal and was taken under submission on the briefs on
file.

ON CONSIDERATION WHEREOF, it is now here
ordered and adjudged by this court that the judgment of
the district court in this cause is affirmed.

ISSUED AS MANDATE: SEP 16 1996

SUPREME COURT OF THE UNITED STATES

No. 96-6839

Hugo Roman Almendarez-Torres

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appelas [sic] for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 31, 1997
